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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BEAU LEE LEWIS ,)
)
Defendant.)

No. CR 04-0217 PJH

**GOVERNMENT’S “STAGE TWO”
BRIEF IN SUPPORT OF DISMISSAL
WITHOUT PREJUDICE**

The United States of America, by and through undersigned counsel, hereby files its “stage two” brief requesting dismissal of the charges in this matter without prejudice.

I. ARGUMENT

Assuming, as directed by the Court in its Order of December 10, 2008, that 145 days were untolled under the Speedy Trial Act (STA) between the arraignment of the defendant on October

UNITED STATES’ BRIEF IN
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1, 1998 and his trial in March 2001, three statutory factors, among others,¹ must be considered in deciding whether to dismiss the charges with or without prejudice: “the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.” 18 U.S.C. § 3162(a)(2); *United States v. Medina*, 524 F.3d 974 (9th Cir. 2008). “[C]ourts are not free simply to exercise their equitable powers in fashioning an appropriate remedy, but, in order to proceed under the Act, must consider at least the three specified factors.” *United States v. Taylor*, 487 U.S. 326, 333, 108 S.Ct. 2413, 2417, 101 L.Ed. 2d 297 (1988). The decision must be based on the particular facts of each case; there is no presumption in favor of either sanction. *Id.* at 334, 108 S.Ct. at 2418.

1. Defendant Lewis’s Crimes Were Serious

Felony crimes carrying a substantial penalty and/or those having a significant social impact are “serious” crimes. See, e.g. *United States v. Pena-Carillo*, 46 F.3d 879, 882 (9th Cir.) (illegal reentry after felony conviction is a “moderately serious offense”) *cert. denied*, 514 U.S. 1122, 115 S.Ct. 1990, 131 L.Ed.2d 876 (1995); *United States v. Clymer*, 25 F.3d 824, 831 (9th Cir. 1994) (conspiracy to distribute and aiding and abetting the manufacture of methamphetamine are undoubtedly serious); *United States v. Castle*, 906 F.2d 134, 138 (5th Cir.1990) (offense punishable by twenty years a serious offense); *United States v. Melguizo*, 824 F.2d 370, 371 (5th Cir. 1987) (the potential term of imprisonment is an indication of the seriousness of the offense; ten years a serious offense).²

¹ The Supreme Court has held that Congress intended prejudice to the defendant be weighed as a fourth factor and it is addressed herein. *United States v. Lewis*, 518 F.3d 1171, 1176 (9th Cir. 1984) (relying on *United States v. Taylor*, 487 U.S. 326, 333, 108 S.Ct. 2413, 2417, 101 L.Ed. 2d 297 (1988)).

² See *United States v. May*, 819 F.2d 531, 534 (5th Cir. 1987) (five counts of possession with intent to distribute controlled substances); *United States v. Stayton*, 791 F.2d 17, 21 (2^d Cir. 1986) (trafficking in 200 kg. of phenylacetone to be used in methamphetamine manufacture); *United States v. Simmons*, 786 F.2d 479, 485 (2^d Cir. 1986) (several counts involving a ‘relatively small quantity’ of substances); *United States v. Phillips*, 775 F.2d 1454, 1456 (11th Cir. 1985) (several offenses involving marijuana importation); *United States v. Brown*, 770 F.2d 241, 244 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986) (distribution and conspiracy to distribute four ounces of cocaine with a wholesale value of \$10,000); *United States v. Russo*, 741 F.2d 1264, 1267 (11th

Offenses that courts have not deemed sufficiently serious for purposes of this analysis include, for example, mail theft of a ring (*United States v. Caparella*, 716 F.2d 976, 980 (2d Cir. 1983)) and mail theft of a check *United States v. Jerve*y, 630 F. Supp. 695, 698 (S.D.N.Y. 1986).

In his first trial, Defendant Lewis was charged with, and convicted of, 17 felonies related to trafficking in protected wildlife including smuggling, which has a maximum penalty of 5 years imprisonment and a \$250,000 fine; and money laundering, which has a maximum penalty of 20 years imprisonment and a \$500,000 fine. The convictions were based on Lewis's intentional importation, for resale, of six illegal shipments of approximately 125 animals protected by domestic law and international treaty, many of which died in transit. Judge Jenkins sentenced the Defendant to 36 months imprisonment. In Lewis's second trial, he was found guilty of a subset of these original felony offenses and was sentenced to 23 months in prison. These crimes are "serious" within the context of the Act and the standard established by courts which have addressed this issue, as described above.

2. Facts and Circumstances Of The Delay Do Not Justify Dismissal With Prejudice

The second factor, the circumstances of dismissal, requires consideration of the government's reason for having violated the STA. *United States v. Martinez-Espinoza*, 299 F.3d 414, 418 (5th Cir) cert. denied 123 S.Ct. 2662 (2003). As has been exhaustively argued in prior pleading, the government litigated this complex case in a manner that sought to preserve the possibility of possibility of a joint trial including defendants Lewis, Wong, Burroughs and the Arizona defendants. Defendant Lewis was not a peripheral player in the conspiracy charged; he was a leader and recruiter of others, decided what animals would be ordered, and arranged the timing and manner of the shipments with Wong and Miller.

The total non-excludable delay beyond the STA's 70-day deadline during the 17-month period between arraignment and trial amounts to, at most, 75 days. It was the result of the

Cir. 1984) (several offenses involving methaqualone); *United States v. Carreon*, 626 F.2d 528, 533 (7th Cir. 1980) (one count of conspiracy to distribute heroin and seven counts of heroin distribution); *United States v. Veillette*, 654 F.Supp. 1260, 1263 (D. Me. 1987) (possession of 280 grams of cocaine with intent to distribute); *United States v. Green*, 582 F. Supp. 265, 267 (D. Colo. 1984) (one count of distribution of a schedule II drug).

1 government's (and Judge Jenkins's) good-faith reliance on the Act's exclusion of time for pre-
2 trial motions. The government respectfully suggests that only minimal "culpability for the delay-
3 producing conduct" should accrue to the government for failing to foresee the Ninth Circuit's use
4 of a footnote in *Clymer* to narrow the exclusion of time allowed for pre-trial motions decided
5 prior to trial. *United States v. Saltzman*, 984 F.2d 1087, 1093 (10th Cir. 1993), *quoting United*
6 *States v. Hastings*, 847 F.2d 920, 925 (1st Cir.1988). Therefore, this prong of the analysis does
7 not justify dismissal with prejudice.

8 **3. Impact Of Re-prosecution On The Administration Of The Speedy Trial Act And The** 9 **Administration Of Justice**

10 The primary consideration when analyzing this factor is whether dismissal with prejudice is
11 needed to penalize unexecuted and/or bad faith delay. *Medina, supra* at 988, (relying on *United*
12 *States v. Taylor*, 487 U.S.326, 343 (1988)). Put another way, the question is whether the
13 defendant suffered actual prejudice as a result of the delay and whether the government engaged
14 in "prosecutorial misconduct that must be deterred to ensure compliance with the Act." See, e.g.
15 *United States v. Pierce*, 17 F.3d 146, 149 (6th Cir. 1994). When the charge is "serious," as it is
16 here, "courts should impose the sanction of dismissal with prejudice only for a correspondingly
17 serious delay, especially in the absence of prejudice." *United States v. May*, 819 F.2d 531, 534
18 (5th Cir. 1987).

19 The only arguable prejudice here is delay and the change of attorneys between charging and
20 trial. Mere delay is not enough: the defendant has been un-detained throughout these
21 proceedings and has made no assertion of missing or memory-impaired witnesses. The
22 defendant's discomfiture at the replacement of his first attorney is also insufficient to warrant a
23 finding of substantial prejudice to him. Mr. Lewis has been represented by appointed counsel
24 throughout these proceedings. His first attorney left the case in June 2000 to take a job overseas:
25 his present counsel has represented him since, through two lengthy trials, appellate and post-
26 appeal litigation. At no time in these proceedings has the defendant expressed any complaint
27 about the quality or attentiveness of his present counsel. The Supreme Court has held that "the

1 right to counsel of choice does not extend to defendants who require counsel to be appointed for
2 them.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 26 S.Ct. 2557 (2006), *quoted in*
3 *United States v. Ensign*, 491 F.3d 1109, 1113 (9th Cir. 2007) [affirming trial court decision, over
4 the defendant’s objection, to terminate representation of appointed attorney]. Moreover, the loss
5 of the defendant’s first attorney and, arguably, a significant portion of the delay in this case,
6 occurred at least in part because he did not seek a severance at the time he was seeking a prompt
7 trial. This fact is not insignificant: the procedural rules, the goals of judicial economy and
8 common sense support the idea of jointly trying defendants who are charged together, especially
9 in conspiracy cases. The record in this case does not support a finding that dismissal with
10 prejudice is necessary to penalize negligent or bad-faith delay or otherwise ensure a salutary
11 impact on the administration of justice. Indeed, the opposite conclusion is well-justified in light
12 of the facts and circumstances leading to the apparent STA violation here.

13 II. CONCLUSION

14 For all the reasons set forth herein, the government respectfully requests the Court dismiss
15 the charges in this matter without prejudice.

16 Dated: December 24, 2008

Respectfully submitted,

18 JOSEPH P. RUSSONIELLO
19 United States Attorney

20
21 /s/
22 ROBERT S. ANDERSON
23 Special Assistant United States Attorney
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CERTIFICATE OF SERVICE

I, Rayneisha Booth , hereby certify that on the 24th day of December, 2008, I sent a true and correct copy of this memorandum and attachments by facsimile to:

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